1986

The State of Utah v. Allen Tim Hefner : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 860221-CA
v.	:	
ALLEN TIM HEFNER,	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM CONVICTION OF BURGLARY, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. §76-6-202 (1978); AGGRAVATED ARSON, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. §76-6-103 (1978); AND ARSON, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. §76-6-102 (1978), IN THE SECOND JUDICIAL DISTRICT COURT, IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE RONALD O. HYDE, PRESIDING.

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IN THE UTAH COURT OF APPEALS

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Defendant, Allen Tim Hefner, was charged with Burglary, a second-degree felony, in violation of Utah Code Ann. §76-6-202 (1978); Theft, a second-degree felony, in violation of Utah Code Ann. §76-6-404 (1978); Aggravated Arson, a second-degree felony, in violation of Utah Code Ann. §76-6-103 (1978); and Arson, a third-degree felony, in violation of Utah Code Ann. §76-6-102 (1978).

Defendant was convicted of Burglary, aggravated arson, and arson, in a jury trial held May 28, 1986, in the Second Judicial District Court, in and for Weber County, State of Utah, the Honorable Ronald O. Hyde, presiding. Defendant was sentenced by Judge Hyde on June 13, 1986, to serve a term in the Utah State Prison of not less than one year nor more than 15 years for the burglary offense; not less than one year nor more than 15 years for the aggravated arson offense; and not to exceed five years for committing arson. These sentences were to run concurrently.

STATEMENT OF THE FACTS

On April 16, 1986 at 12:45 a.m., Ogden City fire and police departments responded to a fire at 1530 21st Street. When they arrived, they found that the fire was raging simultaneously in a house and a garage which were 60 feet apart and not connected in any way (R. 110).

Robert Lee, the owner of both structures, learned of the fire over his C.B. radio and hurried to the scene (R. 179-80). Upon arriving, he informed Police Officer David Stevens he suspected that defendant, Allen Tim Hefner, had started the blaze (R. 116). He based his suspicions on previous experiences with defendant.[1] Lee then accompanied the police to defendant's home to see if defendant's car, a tan Volkswagon Rabbit, was parked there. It was not (R. 121-22).

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[1] Lee had known defendant since 1977 when he met him over the C.B. radio (R. 170). Defendant is an avid C.B. operator and has the "handle" or code name of "Florida Fox" (R. 164). Lee, as the owner of Ogden Industrial Plastics, has also employed defendant twice because defendant asked for a job (R. 172). The first time was after Lee's first factory was hit by lightning and destroyed by fire (R. 172, 187, 237). Defendant left Lee's employ nine months before defendant set Lee's second plant on fire (R. 187, 268). Defendant also worked with Lee on projects at the garage/fiberglass fabrication shop that burned down as a result of the April 16, 1986 fire (R. 182-83).

Lee testified unwillingly at defendant's previous trial in 1984. Because of this, defendant became angry with Lee (R. 174, 282) and placed many threatening phone calls to Lee and members of Lee's family at all hours of the day and night. These calls were registered by the phone company (R. 174-76). There was also a "bull's eye" painted on the driver's side window of their car (R. 176).

John Grant, who lived in the house for the three years previous to the fire (R. 154),[2] was working the grave-yard shift for Ogden City in the street maintenance department when the fire was started (R. 155). He was informed by Police Officer Joe Coxey that there was a fire on the block where his residence was located (R. 157). Grant suspected it was his residence that was on fire since he had been informed by defendant's son, Michael, that Grant was living in a "war zone" and had 30 days to move out of the home (R. 157).

After the fire was extinguished, Grant found that six pieces of his C.B. radio equipment had been removed from the house. The stolen equipment was valued at $2,000.[3] Nothing else in the home or shop was taken. This was unusual since Grant had other valuables in the house such as four televisions, a microwave, and firearms (R. 160-63). Lee estimated that the value of his property destroyed in the fire was $124,242 (R. 87-88). He also lost a government contract valued at $249,000 because his specialized equipment was destroyed (R. 170).

Shortly after the fire, Inspector Winston Sales of the Ogden Fire Department was asked to investigate the blaze (R. 126). As Sales determined the cause of the fire, he discovered an uncapped gas can laying on its side in the living room area (R. 129, 130, 131). Its contents had been poured onto the floor,

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[2] Lee owned the house but did not reside there.

[3] During the evening of April 15, 1986, the C.B. equipment and a 12-inch black and white television set were also stolen out of Grant's truck (R. 159, 162).

causing a "puddling effect" which is typical in non-accidental fires (R. 133). The can still contained traces of gasoline (R. 200, 207). Samples taken from the house indicated that petroleum products had been poured onto them (R. 146).

Sales also discovered that the front left burner of the kitchen stove was left on high (R. 134). Grant testified at trial that he had not used the stove for a day and a half (R. 156). Another indication of arson-related activity was the fact that three separate fires were started in the house: the living room (R. 132, 145), the kitchen (R. 135), and the back porch (R. 138-39). Other factors were the low-burning nature of the fire, the high amount of metal fatigue and glass damage which indicate a hot, fast-burning fire (R. 133-35). There was also a ladder leaning up against the exterior west window of the garage (R. 142). This provided access to the fiberglass fabrication shop in the garage where flammable substances were kept such as resins, methylethyl keytone (MEK), acetones, and thinners (R. 141).

Sales testified that the fire department uses MEK to set fires for practice purposes since it has a low "flash point" and is extremely volatile. MEK is a highly flammable liquid (R.

148).[4]

In Sales' expert opinion, the fires in the home and the garage were non-accidental. He based his opinion on the factors listed above and the fact that the fire was started both in the house and the garage which were separated by a great distance (R. 144). There was no wind blowing which would cause the fire to jump from one location to another (R. 144).

On the morning of April 16, 1986, Detective David Lucas of the Ogden City Police Department met with Robert Lee at Lee's residence. Also present was Ronnie Williams who had known defendant for seven years. Williams told Lucas of a conversation he had with defendant outside the Ogden Community Halfway House in October of 1985.[5] While in defendant's tan Volkswagon Rabbit (R. 213), defendant talked with Williams about "torching" "Frog's" house (R. 210).[6] Williams did not know who "Frog" was

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[4] Steve Clemens, a criminologist with the Weber State Crime Lab who has expertise in the area of arson, also testified that MEK has a low flash point of approximately 35 degrees and is very flammable (R. 205).

Lee testified concerning MEK since he was familiar with its use. Lee contradicted both Sales and Clemens, who are experts in the area of flammable chemicals, and said that MEK peroxide was not as volatile as acetone or gasoline (R. 191). However, he did state that MEK peroxide was highly reactive, especially with metals (R. 182), and creates its own oxygen as it burns, becoming extremely hazardous (R. 192). He also added that there was acetone in the shop which ignites easily with a spark (R. 182). Lee testified that he would not consider himself an expert in the flammability of liquids (R. 194).

[5] Williams was at the halfway house for committing a felony (R. 209). He was on parole at the time of trial (R. 214).

[6] Williams noticed that defendant's car had a stereo with speakers in the back but did not observe any emblems or stickers in the car (R. 212-13).

at the time but later found out that it was Lee's "handle" or code name over the C.B. radio (R. 210-11). Defendant showed Williams a large sum of money (approximately $500 to $1,000) but Williams refused to do the job for him (R. 210). Defendant said that he wanted Frog's house torched as a personal vendetta but did not want to do it himself for fear that he would get caught (R. 211).

When Williams told this story to his wife, she suggested that they tell Lee whom she had come to know over the C.B. radio while Williams was at the halfway house. Lee than contacted the police and Detective Lucas requested that Williams make a statement at the police station which he did (R. 211). He also repeated this same story under oath during trial without any promises being made by the county attorney's office or the police department in exchange for his testimony (R. 214).

After hearing this story at Lee's residence, Detectives Lucas and Buck went to defendant's house. Detective Buck took defendant to the station house while Lucas remained behind to ask defendant's wife some questions (R. 216-17). She said that defendant had gone fishing the day before and was home all evening with her watching t.v. and videos (R. 292). When Lucas confronted her with the fact the police did not see defendant's car parked at the house during the early hours of the morning, she admitted that defendant was not home all night (R. 292). After receiving this story from defendant's wife and also learning from a neighbor that defendant had carried some radio equipment into his home earlier in the day, Lucas returned to the station house (R. 217, 233).

Upon arriving at the police station, Lucas verbally gave defendant his Miranda rights which he waived (R. 219).[7] Defendant did not consider himself under arrest at the station house. He felt that he could leave at any time (R. 251). After waiving his rights, defendant consented to allow Lucas to search his car and home (R. 217).

Detective Lucas and Officer Coxey returned to defendant's house at 4:00 p.m. on April 16, 1986 to execute the search. When they arrived they asked Mrs. Hefner to give them the clothing defendant was wearing the day before. She brought out a gray jogging top and a pair of Levis with a stain on the left leg near the knee (R. 202, 217). The stain was blackish in color, had an odor similar to airplane glue, and was composed of MEK and traces of xylene, a chemical found in gasoline (R. 121, 202-203).[8]

With this evidence, Lucas returned to the station house and started talking with defendant. At first defendant repeated his wife's explantion of where he had been on April 15 and 16, 1986. He said he had been fishing with two of his children on April 15 and watched television with his wife that evening. When

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[7] These rights are specified in Miranda v. Arizona, 384 U.S. 436 (1966). Lucas tape-recorded this part of the conversation without defendant's knowledge (R. 219, 297). Lucas then started to have technical problems with the recorder and defendant was advised of the recording. He objected to it and the recording stopped (R. 296). This tape recording was played to the jury and admited as State's exhibit #28 (R. 43).

[8] Defendant's witness, Chief Fire Marshall Allan Peek was allowed to smell the stain at trial and made "a guess" that the substance was a fiberglass resin. However, Peek asserted that he had no expertise in the area of fiberglass resins (R. 244).

Lucas attempted to ascertain which t.v. shows he watched, defendant said that he was actually watching video tapes.

Acting on a reasonable suspicion that defendant had disposed of the stolen radio equipment, Lucas told him that a neighbor had seen defendant carrying radio equipment out of the house at 1530 21st Street and putting it in his car (R. 223). Lucas said that would place defendant at the scene of the crime (R. 223). It was at that point that defendant told Lucas what really happened. As defendant spoke, Lucas wrote down exactly what he said as follows:

> Robert Lee was making it appear over the radio that I was threatening him. He played a piece out of the tape like you're a dead sun [sic] of a bitch. I don't know if that is what it was. I heard it second hand. People have told me about it. He bum-wrapped me last time. He told Stubbs that I had told him that I had burnt the Hertz building down, which I never told Lee. I never burnt the building down, either. I got drunk last night, and a combination of what I just explained, I took two bottles of MEK, methylethyl ketone peroxide out of the fridge in the garage. I set one on the floor and lit the top of it. I set the other on the stove in the house. The stove was electric, and I turned the burner on. Then I left in my VW rabbit.

(R. 221). Lucas asked defendant if he took anything and the defendant replied "yeah, the radio stuff" (R. 221). And when asked to describe the radio equipment, defendant answered "five or six pieces, I don't really know. I just piled it up and put it in the car" (R. 222). When asked how he entered the garage, defendant said "the window on the west side. I either climbed a tree or ladder. I don't remember for sure because I was drunk" (R. 222). Defendant then said that he probably stained his pants

on "the 55 gallon drum in the garage" and entered the house through the front door (R. 222). Defendant also admitted stealing a radio out of a truck when he first arrived at the scene and disposing of the radio equipment in the Ogden River (R. 222).

Lucas then had defendant write his answers to two questions which were: "Do you understand your writes [sic]"? and "you do this voluntarily without an attorney"? Defendant wrote affirmative answers to both questions (R. 220). Lucas asked defendant if he could read Lucas' handwriting. Defendant responded that he could. Lucas then requested that defendant read through the statement which contained his Miranda rights and the written confession and make any necessary corrections. Defendant read through the entire confession then signed his name on the cover page and also in the witness space below the sentence that states "I have read this statement and it is true and correct." After defendant had signed both the front and back pages, Lucas signed and dated the back page (R. 222, 231). Both Detective Lucas and defendant agreed that no promises were made in exchange for the confession (R. 230, 277).[9]

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[9] At one point before Lucas returned to defendant's house to execute the consent search, defendant said "I'll give you a statement if you call my wife." But Lucas responded by saying "I can't do that. I can't go out and call your wife . . . [Y]ou know, we're kind of making promises, and I can't do that" (R. 230). And even though Lucas did eventually call defendant's wife knowing that she was not home (R. 296-97) and took defendant home after the confession was made so that he could sign some checks for his wife to cash (R. 230-31) defendant still asserted under oath that Lucas did not promise him anything (R. 277).

At trial, defendant took the stand and claimed that Lee, Grant, Williams, and Lucas all perjured themselves during the trial (R. 283). He claimed that Lee confessed to him that h had set his previous two businesses on fire and probably set thi one on fire also in order to avoid problems with the Internal Revenue Service (R. 268-271). However, one of the defendant's witnesses, Chief Fire Marshall Allan Peek refuted this by testifying that the fire which destroyed Lee's first business in 1977 was caused by lightning (R. 237). Peek testified that Lee was not the owner of the building and thus not the one who received $94,000 from the insurance company. Lee only received $25,000 to help him offset his losses (R. 240-41). Also, Lee denied under oath that he set any of his businesses on fire (R. 187).

Defendant also gave a different account of his whereabouts on the night of April 15 and the early morning hours of April 16, 1986. He claimed that he drove his car to a grocery store and purchased some alcohol which he consumed. He then fell asleep and did not wake up until 6:00 a.m. the next morning (R. 246-47). Lucas testified that the first time he had heard this story was at trial (R. 292).

Defendant claimed that Lucas composed the confession which defendant signed (R. 254-55). Defendant also asserts that he merely witnessed the confessions since he signed it on the second page in a place provided for the witness' signature (R. 260).

On May 28, 1986, based on the evidence presented at trial, the jury found defendant guilty of aggravated arson and burglary, both second-degree felonies and arson, a third-degree felony. He was found not guilty of theft (R. 73-76). On June 13, 1986, Judge Ronald O. Hyde sentenced defendant to serve a term in the Utah State Prison of not less than one year nor more than 15 years for the burglary offense; not less than one year nor more than 15 years for the aggravated arson offense; and not to exceed five years for committing arson. These sentences were to run concurrently (R. 77). From his conviction and sentence, defendant now appeals (R. 98, 102).

SUMMARY OF ARGUMENT

The evidence presented at trial was sufficient for the jury to convict defendant of the crimes charged. The evidence included a signed statement in which the defendant voluntarily confessed to entering a home and garage located at 1530 21st Street in Ogden and setting them on fire.

ARGUMENT

POINT I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT DEFENDANT'S CONVICTIONS.

Defendant asserts that the evidence produced at trial was insufficient for the jury to convict him. He claims that evidence of his signed confession and other evidence was "so inconclusive and unsatisfactory that a reasonable mind must have entertained reasonable doubt as to defendant's guilt." (Appellant's brief at 4).

This Court has adopted the following standard of review when considering a challenge to the sufficiency of the evidence:

> The standard for determining sufficiency of the evidence is that the evidence be "so inconclusive or so inherently improbable that reasonable minds could not reasonably believe defendant had committed a crime." State v. Romero, 554 P.2d 216, 219 (Utah 1976). In determining whether evidence is sufficient, the Court will review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the jury verdict. State v. Kerekes, 622 P.2d 1161, 1168 (Utah 1980). Unless there is a clear showing of lack of evidence, the jury verdict will be upheld. State v. Logan, 563 P.2d 811, 814 (Utah 1977).

State v. Gabaldon, 55 Utah Adv. Rep. 68, 69 (Ct. App. April 15, 1987). As noted in State v. Booker, 709 P.2d 342 (Utah 1985):

> In reviewing the conviction, we do not substitute our judgment for that of the jury. "It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses . . . ." State v. Lamm, Utah, 606 P.2d 229, 231 (1980); accord State v. Linden, Utah, 657 P.2d 1364, 1366 (1983). So long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops.

Id. at 345 (citation omitted). And, even if the Court views the evidence as less than wholly conclusive, or if contradictory evidence or conflicting inferences exist, the verdict should be upheld. State v. Howell, 649 P.2d 91, 97 (Utah 1982). In short, "on conflicting evidence the Court is obliged to accept the version of the facts which supports the verdict." State v. Isaacson, 704 P.2d 555, 556 (Utah 1985) (citing State v. Howell, 649 P.2d at 93). See also, State v. Moncada, No. 860243-CA (Ut. Ct. App. May 13, 1987). Therefore, this Court has no duty to

accept defendant's conflicting testimony concerning the facts of this case.

Defendant's insufficiency argument is little more than a request for this Court to engage in de novo review of the weight of the evidence and the credibility of the witnesses, and then to substitute its judgment for that of the jury. As is evident from the authority cited above, this Court and the Utah Supreme Court have stated that they will not review a criminal case in that fashion.

Defendant was convicted in the court below of aggravated arson, a second-degree felony, arson, a third-degree felony, and burglary, a second-degree felony[10] The evidence presented at trial supports these convictions.

The crime of buglary includes the following elements listed in Utah Code Ann. §76-6-202:[11] Defendant must have (a) entered or remained unlawfully in a dwelling or any portion of a dwelling, (b) with the intent to commit a theft and/or felony and/or an assault therein. The elements of arson under Utah Code

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[10] Defendant's brief does not make clear whether he is challenging his burglary conviction. His only request of this Court is that "the conviction" be reversed. All arguments in his brief focus only on the facts relating to the acts of arson. See Appellant's Brief at 5.

[11] 76-6-202 reads:

(1) A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person.

(2) Burglary is a felony of the third degree unless it was committed in a dwelling, in which event it is a felony of the second degree.

Ann. §76-6-102 (1978)[12] are that defendant (a) by means of fire or explosives, (b) intentionally and unlawfully damaged, (c) the property of another which damage exceeded $5,000. The elements of aggravated arson, Utah Code Ann. § 76-6-103 (1978)[13] are essentially the same except that the jury must find that defendant intentionally and unlawfully damaged a habitable structure by means of fire or explosives. No damage amount is specified.

The jury considered defendant's signed statement in which he confessed to (1) entering both the garage and home located at 1530 21st Street in Ogden on April 16, 1986, (2) stealing radio equipment from the home and Grant's truck, and (3) setting both the home and garage on fire. They also considered the fact that defendant's Levis had been stained with MEK, the substance used to set the blaze. There was also sworn testimony presented by both Lee and Williams to show that defendant had the intent and the motive to destroy Lee's property. Based upon this strong evidence, the jury, acting reasonably, found that defendant had unlawfully and intentionally entered both the

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[12] 76-6-102 reads in pertinent part:

(1) A person is guilty of arson if, under circumstances not amounting to aggravated arson, by means of fire or explosives, he unlawfully and intentionally damages:
(b) The property of another.
(2) . . . A violation of subsection (b) is a felony of the third degree if the damage exceeds $5,000 value.

[13] 76-6-103 reads in pertinent part:

[(1)] A person is guilty of aggravated arson if by means of fire or explosives he intentionally and unlawfully damages:
(a) A habitable structure

garage and home in order to set fire to the structures. Accordingly, defendant was properly convicted of burglary, arson, and aggravated arson.

Defendant claims that his confession was not worthy of belief because it was scribed by Detective Lucas and signed by defendant in the place provided for the witness' signature.[14]

Defendant next challenges the credibility of the State's witnesses. However, the weight and credibility given to witnesses is left entirely to the discretion of the jury. The testimonies of Williams and Lee were believable and not illogical and contradictory as defendant claims.[15] ..t no point did Williams or Lee contradict themselves. Their testimonies were logical and straightforward.[16] It was not illogical for Williams to testify he saw defendant with a large sum of money. It was possible for defendant to have earned the money or to have obtained it from some other source. Williams testimony was also not discredited because he failed to notice a sticker in

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[14] Defendant does not assert that the confession was illegally obtained. Indeed, he was given his Miranda rights after he first arrived at the station house and later read them again as he proof read his confession. He acknowledged in writing that he understood his rights and waived them voluntarily without an attorney present. He verified that he was literate. Defendant also testified that he was not in custody but was free to go at all times and that there were no promises made in exchange for his confession. See R. 273.

[15] Defendant states in one part of his brief that Lee is the only real expert on MEK that testified at trial and in another portion claims that Lee's testimony is without foundation. See Appellant's Brief at 2 and 4.

[16] The same cannot be said for defendant's testimony. He contradicted himself on the stand. See R. 273-74, 277. He also changed his alibi story at trial (R. 247-48, 292).

defendant's car which read "slightly damaged" (R. 287). Defendant could have placed the sticker on his dashboard after the conversation in question occurred. Williams did notice that defendant's car was equipped with a stereo and two speakers which were located in the back of the car.

Defendant also erroneously asserts that the evidence presented at trial refutes the State's claim that defendant's pants were stained with MEK, the material used to start the fire. The State had an arson expert testify that the stain on the pants was composed of MEK and xylene. This determination was made after the stain was tested scientifically. Defendant's witness, Peek, said that he "guessed" the stain was made from fiberglass resin. Peek claimed no expertise in the area of resins.

Defendant finally claims that "the contents of the document [confession] were totally inconsistent with the Fire Marshalls [sic] opinion of the casuation [sic] of the fire." Appellant's Brief at 5. However, Chief Fire Marshall Peek never testified as to the cause of the fire. He only testified regarding the fire which destroyed Lee's business in 1977. See R. 234-43. The State, on the other hand, presented two arson experts who testified that MEK, the substance defendant used to start the 1986 fire, is extremely flammable and volatile.

CONCLUSION

Based upon the foregoing argument and in light of the standard of review in this case, the State respectfully requests that defendant's conviction be affirmed.

DATED this 18th day of May, 1987.

Earl F. Dorius

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Kevin P. Sullivan, Public Defender Association, 205 26th Street, Suite 13, Ogden, Utah 84401, this 18th day of May, 1987.

Earl F. Dorius